

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

JOE RASCON,)	No. CV-F-08-1394 OWW/GSA
)	
)	MEMORANDUM DECISION AND
Plaintiff,)	ORDER DENYING DEFENDANTS'
)	MOTION TO DISMISS (Doc. 8)
vs.)	
)	
CATALINA RODRIGUEZ, et al.,)	
)	
Defendants.)	
)	
)	

Plaintiff Joe Rascon has filed a Complaint for Damages against Catalina Rodriguez, Jonathan Long and David Wilkin, peace officers with the Fresno Police Department; Larry Hustedde, a sergeant with the Fresno Police Department; and Mark Salazar, a lieutenant with the Fresno Police Department.

Plaintiff's Complaint alleges the following facts:

9. On January 25, 2008, Plaintiff stopped at the Moonlite Restaurant located at 2731 West Clinton Avenue, Fresno, California, where he was served and consumed two non-alcoholic beverages.

10. At approximately 5:20 p.m. as Plaintiff

1 exited the restaurant, he observed a Fresno
2 police officer sitting in a patrol car with
3 its overhead lights activated, parked in the
4 middle of the restaurant parking lot. The
5 patrol car was located in a position
6 partially behind and at a distance from
7 Plaintiff's pickup, which was parked in a
8 space immediately adjacent the building in a
9 row with other parked vehicles.

10 11. Plaintiff visually scanned the parking
11 lot to determine if there was a vehicle that
12 was the subject of the patrol car's presence
13 at that location but there was no other
14 vehicle not in a parking space and Plaintiff
15 did not identify any person who appeared to
16 be involved with the police officer. The
17 officer appeared to be completing paperwork
18 inside the patrol car.

19 12. Plaintiff entered his pickup, started
20 the engine and turned on its lights.
21 Plaintiff then engaged in a cell phone
22 conversation for approximately one minute.
23 After completing that conversation, Plaintiff
24 looked back and determined the patrol car was
25 still in the same location with the officer
26 in the driver's seat. Plaintiff exited his
vehicle, went to the rear of the cab, waved
at the officer but did not make any eye
contact nor speak to the officer.

13. Plaintiff got back into the pickup and
started maneuvering the vehicle out of the
parking space. When the rear end of
Plaintiff's pickup passed in front of the
patrol car, the officer, Defendant Rodriguez,
appeared to the left and rear of the pickup's
driver's side door. Defendant Rodriguez then
yelled at Plaintiff that he was interfering
with her traffic stop, to get out of his
vehicle and accused Plaintiff of having been
drinking.

14. Plaintiff exited his vehicle as ordered
and told Defendant Rodriguez that he had not
been interfering and was merely backing out
so he could leave; he further advised
Defendant Rodriguez that he had not been
aware she was conducting a stop.

1 15. At that time, a second patrol car
2 arrived with two officers in it. One of the
3 officers, Defendant Wilkin, asked Defendant
4 Rodriguez what was happening and she said
5 that Plaintiff had been interfering. Both
6 officers in the second patrol car then exited
7 their vehicle. Defendant Wilkin requested
8 Plaintiff's driver's license, which Plaintiff
9 provided. Defendant Wilkin took the license
10 and walked back to the patrol car. Defendant
11 Rodriguez then walked over to a car parked to
12 the left of Plaintiff's pickup and contacted
13 its driver.

14 16. After the two officers walked away,
15 Defendant Long started talking to Plaintiff
16 in a disrespectful manner and pointing his
17 right index finger repeatedly in Plaintiff's
18 face. Plaintiff stated that Defendant Long
19 needed to stop addressing Plaintiff in such a
20 rude and disrespectful manner; that
21 Defendants did not have legal cause to detain
22 Plaintiff.

23 17. Defendant Wilkin returned and said to
24 Plaintiff 'You need to shut your mouth;
25 you're pissing me off.' Defendant Wilkin
26 then leaned over Plaintiff's body, audibly
sniffed and said he smelled alcohol.
Defendant Wilkin stated Plaintiff was under
arrest for interfering and operating a motor
vehicle while under the influence of alcohol.
Plaintiff was handcuffed and walked by
Defendant Wilkin to the patrol car.

18 18. At the patrol car, Defendant Wilkin
19 searched Plaintiff and retrieved his wallet
20 and thereby observed Plaintiff's Fresno
21 County Sheriff's badge and identification.
22 Defendant Wilkin asked Plaintiff why he had
23 not said he was a cop. Defendant Wilkin put
24 Plaintiff in the rear of his caged patrol
25 car.

26 19. Approximately ten minutes later,
Defendant Hustedde arrived and spoke with the
Defendant Officers. With Plaintiff in the
rear of the patrol car, Defendant Hustedde
questioned Plaintiff three separate times
regarding the facts of the allegations of
interfering with Defendant Rodriguez's

1 traffic stop. Defendant Hustedde questioned
2 Plaintiff about the consumption of any
3 alcoholic beverage. Defendant Hustedde
4 stated there had been no violation of law.
5 Defendant Hustedde stated he had to summon
6 his lieutenant to determine whether to book
7 Plaintiff into jail.

8
9 20. Plaintiff requested a PAZ test to
10 determine his blood alcohol but Defendant
11 Hustedde stated the lieutenant had refused to
12 permit this. Plaintiff is informed and
13 believes the referenced lieutenant was
14 Defendant Salazar.

15
16 21. Approximately thirty minutes after
17 Plaintiff had been arrested, Defendant
18 Salazar arrived and spoke with the Defendant
19 Officers, Defendant Hustedde and others.
20 After Defendant Salazar had been on the scene
21 approximately twenty minutes, Plaintiff was
22 released with no charges. Defendant Salazar
23 also refused to have a PAZ test administered.

24
25 The First Claim for Relief is for violation of 42 U.S.C. §
26 1983 and alleges that, in detaining and arresting Plaintiff,
27 Defendants violated Plaintiff's right to equal protection and to
28 be free from unreasonable search and seizure. The First Claim
29 for Relief alleges:

30
31 25. That Defendants, and each of them, in
32 all of their mutual and respective acts and
33 omissions in connection with Plaintiff's
34 detention and arrest, knew that Plaintiff had
35 violated no law and that their aforesaid
36 actions were without probable cause and in
37 violation of Plaintiff's aforesaid
38 Constitutional rights and that the violation
39 of these rights was knowing, willful and
40 malicious and with reckless disregard for
41 Plaintiff's rights.

42
43 26. Plaintiff believes that Defendants, and
44 each of them, in all of their mutual and
45 respective acts and omissions in connection
46 with Plaintiff's detention and arrest, were
47 motivated by the fact that Plaintiff is

1 Hispanic.

2 The Second Claim for Relief is for conspiracy in violation
3 of 42 U.S.C. § 1985 and alleges:

4 29. In perpetrating, allowing, and ratifying
5 the aforesaid acts and omissions, Defendants
6 Rodriguez, Long and Wilkin, and each of them,
7 conspired to and did interfere with and deny
8 Plaintiff the exercise of his civil rights to
9 be free from unlawful search and seizure.

10 30. In perpetrating, allowing and ratifying
11 the aforesaid acts and omissions of
12 Defendants Rodriguez, Long and Wilkin, and
13 each of them, Defendants Hustedde and Salazar
14 refused to prevent the violation of
15 Plaintiff's rights and the injuries and
16 losses arising therefrom.

17 The Third Claim for Relief is for negligence pursuant to 42
18 U.S.C. § 1986 and alleges:

19 35. Defendants Rodriguez [sic] and Hustedde,
20 individually had knowledge of the aforesaid
21 acts and omissions of Defendants Wilkin, Long
22 and Salazar [sic], and each of them.

23 36. Defendants Rodriguez [sic] and Hustedde,
24 individually, had the power to prevent or aid
25 in preventing the commission of these wrongs,
26 but each of said Defendants neglected or
refused to do so.

27 37. In perpetrating, allowing and ratifying
28 the aforesaid acts and omissions, Defendants
29 Rodriguez [sic] and Hustedde, and each of
30 them, neglected to prevent the violation of
31 Plaintiff's rights and the injuries and
32 losses arising therefrom.

33 Defendants move to dismiss the Complaint for failure to
34 state a claim upon which relief can be granted pursuant to Rule
35 12(b) (6), Federal Rules of Civil Procedure.

36 A. Governing Standards.

1 A motion to dismiss under Rule 12(b)(6) tests the
2 sufficiency of the complaint. *Novarro v. Black*, 250 F.3d 729,
3 732 (9th Cir.2001). "A district court should grant a motion to
4 dismiss if plaintiffs have not pled 'enough facts to state a
5 claim to relief that is plausible on its face.'" *Williams ex rel.*
6 *Tabiu v. Gerber Products Co.*, 523 F.3d 934, 938 (9th Cir.2008),
7 quoting *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct.
8 1955, 1974 (2007). "'Factual allegations must be enough to raise
9 a right to relief above the speculative level.'" *Id.* "While a
10 complaint attacked by a Rule 12(b)(6) motion to dismiss does not
11 need detailed factual allegations, a plaintiff's obligation to
12 provide the 'grounds' of his 'entitlement to relief' requires
13 more than labels and conclusions, and a formulaic recitation of
14 the elements of a cause of action will not do." *Bell Atlantic*,
15 *id.* at 1964-1965. Dismissal of a claim under Rule 12(b)(6) is
16 appropriate only where "it appears beyond doubt that the
17 plaintiff can prove no set of facts in support of his claim which
18 would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-
19 46 (1957). Dismissal is warranted under Rule 12(b)(6) where the
20 complaint lacks a cognizable legal theory or where the complaint
21 presents a cognizable legal theory yet fails to plead essential
22 facts under that theory. *Robertson v. Dean Witter Reynolds*,
23 *Inc.*, 749 F.2d 530, 534 (9th Cir.1984). In reviewing a motion to
24 dismiss under Rule 12(b)(6), the court must assume the truth of
25 all factual allegations and must construe all inferences from
26 them in the light most favorable to the nonmoving party.

1 *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.2002). However,
2 legal conclusions need not be taken as true merely because they
3 are cast in the form of factual allegations. *Ileto v. Glock,*
4 *Inc.*, 349 F.3d 1191, 1200 (9th Cir.2003).

5 Immunities and other affirmative defenses may be upheld on a
6 motion to dismiss only when they are established on the face of
7 the complaint. See *Morley v. Walker*, 175 F.3d 756, 759 (9th
8 Cir.1999); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th
9 Cir. 1980) When ruling on a motion to dismiss, the court may
10 consider the facts alleged in the complaint, documents attached
11 to the complaint, documents relied upon but not attached to the
12 complaint when authenticity is not contested, and matters of
13 which the court takes judicial notice. *Parrino v. FHP, Inc.*, 146
14 F.3d 699, 705-706 (9th Cir.1988).

15 B. FIRST CLAIM FOR RELIEF.

16 Defendants move to dismiss the First Claim for Relief on the
17 grounds that Plaintiff has failed to state a claim for denial of
18 equal protection under Section 1983; Plaintiff has failed to
19 adequately allege personal participation by all Defendants; and
20 Defendants Rodriguez, Hustedde and Salazar are entitled to
21 qualified immunity.

22 1. Denial of Equal Protection.

23 ``To state a claim under 42 U.S.C. § 1983 for a violation of
24 the Equal Protection Clause of the Fourteenth Amendment a
25 plaintiff must show that the defendants acted with an intent or
26 purpose to discriminate against the plaintiff based on his

1 membership in a protected class.'" *Neveu v. City of Fresno*, 392
2 F.Supp.2d 1159, 1179 (E.D.Cal.2005), quoting *Lee v. City of Los*
3 *Angeles*, 250 F.3d 668, 686 (9th Cir.2001); see also *Moua v. City*
4 *of Chico*, 324 F.Supp.2d 1132, 1137 (E.D.Cal.2004):

5 In order to make out an equal protection
6 violation, plaintiffs must prove four
7 elements: (1) the municipal defendants
8 treated them differently from others
9 similarly situated; (2) this unequal
10 treatment was based on an impermissible
11 classification; (3) the municipal defendants
12 acted with discriminatory intent in applying
13 this classification; and (4) plaintiffs
14 suffered injury as a result of the
15 discriminatory classification.

16 Defendants contend that the Complaint's conclusory
17 allegation that Plaintiff's detention and arrest were motivated
18 by the fact that Plaintiff is Hispanic does not state a claim
19 because there are no allegations which support his being treated
20 differently from other similarly situated persons or that
21 Defendants acted with an intent or purpose to discriminate
22 against Plaintiff based on his national origin.

23 Plaintiff responds that the factual allegations in the
24 Complaint imply that Defendants' actions were based on
25 Plaintiff's location outside a restaurant, his attempt to leave
26 the parking lot, and his physical appearance. Plaintiff alleges
that he had not consumed any alcohol, negating any inference that
he smelled of alcohol or was under the influence of alcohol.
Plaintiff asserts that Defendant Rodriguez did not appear to
Plaintiff to be involved in a traffic stop with which Plaintiff
could have interfered and refers to the allegations that

1 Defendants Rodriguez, Wilkin and Long were rude and disrespectful
2 in their comments to Plaintiff. Plaintiff contends that "[f]rom
3 these facts and his personal knowledge of the conduct and
4 attitude of Defendants," his treatment by Defendants was racially
5 motivated. Plaintiff further notes that intent and motivation
6 "are almost always conclusory allegations not susceptible to
7 factual allegations in a complaint" and argues that the factual
8 allegations sufficiently support an inference of unlawful racial
9 motive to withstand the motion to dismiss on this ground.

10 Defendants' motion to dismiss on this ground is DENIED.

11 2. Personal Participation.

12 Defendants move to dismiss the First Claim for Relief on the
13 ground that their respective personal participation in the
14 alleged constitutional violations is not adequately pleaded.

15 "A supervisor is only liable for constitutional violations
16 of his subordinates if the supervisor participated in or directed
17 the violations, or knew of the violations and failed to act to
18 prevent them. There is no respondeat superior liability under
19 section 1983." *Taylor v. List*, 840 F.2d 1040, 1045 (9th
20 Cir.1989). As explained in *Blankenhorn v. City of Orange*, 485
21 F.3d 463, 481 n.12 (9th Cir.2007):

22 An officer's liability under section 1983 is
23 predicated on his 'integral participation' in
24 the alleged violation. *Chuman v. Wright*, 76
25 F.3d 292, 294-95 (9th Cir.1996). "[I]ntegral
26 participation' does not require that each
officer's actions themselves rise to the
level of a constitutional violation.' *Boyd*,
374 F.3d at 780. But it does require some
fundamental involvement in the conduct that

1 allegedly caused the violation. See *id.*

2 a. Catalina Rodriguez.

3 Defendants argue that the facts alleged against Defendant
4 Rodriguez do not state a claim, asserting that the Complaint
5 alleges that Rodriguez yelled at Plaintiff that he was
6 interfering with her traffic stop, ordered him to get out of his
7 vehicle, and accused Plaintiff of having been drinking. At that
8 point Defendants Wilkin and Long arrived and Rodriguez walked
9 over to another vehicle and talked to its driver. Defendants
10 argue that there are no allegations of any personal participation
11 by Rodriguez in Plaintiff's arrest and the claim for violation of
12 the Fourth Amendment should be dismissed against her.

13 Plaintiff responds that Rodriguez falsely accused him of
14 interfering with her traffic stop and with drinking. When
15 Defendant Wilkin placed Plaintiff under arrest, Rodriguez
16 acquiesced by failing to tell Wilkin the truth and that no field
17 sobriety test had been conducted. Plaintiff asserts that
18 Rodriguez failed to act as a reasonable law enforcement officer
19 to stop an unlawful arrest.

20 Defendants argue that merely apprising other officers of her
21 assessment of the situation does not rise to the level of
22 participation in a constitutional violation. Defendant Rodriguez
23 did not detain or arrest Plaintiff and her presence at the scene
24 at the time of his arrest does not implicate her in the
25 allegations of unlawful arrest.

26 Defendants' contention ignores that Rodriguez was the

1 initial and motivating force for Plaintiff's detention and
2 allegedly gave false information about Plaintiff to cause the
3 detention and arrest.

4 Defendants' motion to dismiss as to Defendant Rodriguez is
5 DENIED.

6 b. Larry Hustedde.

7 Defendants assert that the allegations against Defendant
8 Hustedde do not infer his personal participation in the alleged
9 violations of Plaintiff's Equal Protection or Fourth Amendment
10 rights. The Complaint alleges that Defendant Hustedde arrived on
11 the scene after Plaintiff had been arrested and placed in the
12 back of the patrol car. Defendant Hustedde questioned Plaintiff
13 and then contacted his supervisor, Defendant Salazar. Shortly
14 after Defendant Salazar arrived, Plaintiff was released.

15 Plaintiff responds that Defendant Hustedde acknowledged to
16 Plaintiff that no violation of the law had occurred and refused
17 to conduct a PAZ test, thereby inferentially demonstrating his
18 awareness that Plaintiff was not under the influence and his
19 acquiescence in and perpetuation of an allegedly false accusation
20 and arrest. Plaintiff asserts that Defendant Hustedde continued
21 Plaintiff's unlawful detention by not releasing him and "by
22 passing it on to Lt. Salazar," thereby failing to act as a
23 reasonable law enforcement officer to stop an unlawful arrest.

24 Defendants argue that Sergeant Hustedde's attempt to gather
25 information prior to Plaintiff's release does not establish his
26 "integral participation" in Plaintiff's detention or arrest.

1 Defendants' motion to dismiss as to Defendant Hustedde is
2 DENIED. Defendants' contentions raise factual issues to be
3 resolved by summary judgment or trial.

4 c. Mark Salazar.

5 The Complaint alleges that, approximately thirty minutes
6 after Plaintiff was arrested, Defendant Salazar arrived at the
7 scene at the request of Defendant Hustedde. Defendant Salazar
8 spoke with the officers at the scene for approximately twenty
9 minutes and then ordered Plaintiff released. Defendants contend
10 there are no facts to support Defendant Salazar's personal
11 participation in the alleged violations of Plaintiff's
12 constitutional rights.

13 Plaintiff responds that the Complaint alleges that Defendant
14 Salazar refused him the PAZ test before he arrived on the scene,
15 implying that Defendant Salazar did not believe Plaintiff was
16 under the influence of alcohol and did not want to know the
17 truth, but did not immediately order him to be released and
18 unjustifiably prolonged the unlawful detention and arrest after
19 Defendant Hustedde had determined no law had been violated.

20 Plaintiff further argues that the fact that a sergeant and a
21 lieutenant were called to the scene "gives rise to the
22 implication that Defendants were aware the arrest was unlawful
23 and were trying to extricate themselves." Plaintiff contends
24 that each defendant contributed to the total circumstances and
25 each should be held accountable.

26 That Defendant Salazar took some time to gather information

1 to assess the situation does not establish his integral
2 participation in Plaintiff's detention and arrest. However,
3 there is no legal justification for his refusal of the PAZ test
4 while Plaintiff was endeavoring to exonerate himself. The extent
5 to which he knew or should have known that the Defendants
6 Rodriguez, Long and Wilkin were falsifying the alleged probable
7 cause for arrest and continuing an unlawful arrest merits
8 discovery.

9 Defendants' motion to dismiss on this ground is DENIED.

10 3. Qualified Immunity.

11 Defendants Rodriguez, Hustedde and Salazar move to dismiss
12 the First Claim for Relief on the ground of qualified immunity
13 with regard to Plaintiff's claims of detention and arrest in
14 violation of the Fourth Amendment.

15 Qualified immunity serves to shield government officials
16 "from liability for civil damages insofar as their conduct does
17 not violate clearly established statutory or constitutional
18 rights of which a reasonable person would have known." *Harlow v.*
19 *Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has set
20 forth a two-pronged inquiry to resolve all qualified immunity
21 claims. First, "taken in the light most favorable to the party
22 asserting the injury, do the facts alleged show the officers'
23 conduct violated a constitutional right?" *Saucier v. Katz*, 533
24 U.S. 194, 201 (2001). If the court determines that the conduct
25 did not violate a constitutional right, the inquiry is over and
26 the officer is entitled to qualified immunity. However, if the

1 court determines that the conduct did violate a constitutional
2 right, *Saucier's* second prong requires the court to determine
3 whether, at the time of the violation, the constitutional right
4 was "clearly established." *Id.* "The relevant, dispositive
5 inquiry in determining whether a right is clearly established is
6 whether it would be clear to a reasonable officer that his
7 conduct was unlawful in the situation he confronted." *Id.* at
8 202. This inquiry is wholly objective and is undertaken in light
9 of the specific factual circumstances of the case. *Id.* at 201.
10 Even if the violated right is clearly established, *Saucier*
11 recognized that, in certain situations, it may be difficult for a
12 police officer to determine how to apply the relevant legal
13 doctrine to the particular circumstances he faces. If an officer
14 makes a mistake in applying the relevant legal doctrine, he is
15 not precluded from claiming qualified immunity so long as the
16 mistake is reasonable. If "the officer's mistake as to what the
17 law requires is reasonable, ... the officer is entitled to the
18 immunity defense." *Id.* at 205. In *Brosseau v. Haugan*, 543 U.S.
19 194 (2004), the Supreme Court reiterated:

20 Qualified immunity shields an officer from
21 suit when she makes a decision that, even if
22 constitutionally deficient, reasonably
23 misapprehends the law governing the
24 circumstances she confronted. *Saucier v.*
25 *Katz*, 533 U.S., at 206 (qualified immunity
26 operates 'to protect officers from the
 sometimes "hazy border between excessive and
 acceptable force"). Because the focus is on
 whether the officer had fair notice that her
 conduct was unlawful, reasonableness is
 judged against the backdrop of the law at the
 time of the conduct. If the law at that time

1 did not clearly establish that the officer's
2 conduct would violate the Constitution, the
3 officer should not be subject to liability
or, indeed, even the burdens of litigation.

4 It is important to emphasize that this
5 inquiry 'must be undertaken in light of the
6 specific context of the case, not as a broad
7 general proposition.' *Id.*, at 201. As we
8 previously said in this very context:

9 '[T]here is no doubt that *Graham v.*
10 *Connor, supra*, clearly establishes
11 the general proposition that use of
12 force is contrary to the Fourth
13 Amendment if it is excessive under
14 objective standards of
15 reasonableness. Yet, that is not
16 enough. Rather, we emphasized in
17 *Anderson [v. Creighton]* "that the
18 right the official is alleged to
19 have violated must have been
'clearly established' in a more
20 particularized, and hence more
21 relevant, sense: The contours of
22 the right must be sufficiently
23 clear that a reasonable officer
24 would understand that what he is
25 doing violates that right.' ...
26 The relevant, dispositive inquiry
in determining whether a right is
clearly established is whether it
would be clear to a reasonable
officer that his conduct was
unlawful in the situation he
confronted.' ...

The Court of Appeals acknowledged this
statement of law, but then proceeded to find
fair warning in the general tests set out in
Graham and *Garner* ... In so doing, it was
mistaken. *Graham* and *Garner*, following the
lead of the Fourth Amendment's text, are cast
at a high level of generality. See *Graham v.*
Connor, supra, at 396 ('[T]he test of
reasonableness under the Fourth Amendment is
not capable of precise definition or
mechanical application'). Of course, in an
obvious case, these standards can 'clearly
establish' the answer, even without a body of
relevant case law.'

1 543 U.S. at 198-199. However, as explained in *Wilkins v. City of*
2 *Oakland*, 350 F.3d 949, 956 (9th Cir.2003), cert. denied sub nom.
3 *Scarrot v. Wilkins*, 543 U.S. 811 (2004):

4 Where the officers' entitlement to qualified
5 immunity depends on the resolution of
6 disputed issues of fact in their favor, and
7 against the non-moving party, summary
8 judgment is not appropriate. See *Saucier*,
9 533 U.S. at 216 ... (Ginsberg, J.,
10 concurring) ('Of course, if an excessive force
11 claim turns on which of two conflicting
12 stories best captures what happened on the
13 street, *Graham* will not permit summary
14 judgment in favor of the defendant
15 official.').

16 Probable cause to arrest exists if, "under the totality of
17 the circumstances known to the arresting officers, a prudent
18 person would have concluded that there was a fair probability
19 that [the plaintiff] had committed a crime. *Beier v. City of*
20 *Lewiston*, 354 F.2d 1058, 1065 (9th Cir.2004). The proper inquiry
21 where an officer is claiming qualified immunity for a false
22 arrest claim is "whether a reasonable officer could have believed
23 that probable cause existed to arrest the plaintiff." *Franklin*
24 *v. Fox*, 312 F.3d 423, 437 (9th Cir.2002). Qualified immunity
25 does not depend on whether probable cause actually existed.

26 a. Defendant Rodriguez.

 Defendants argue that it was not unreasonable for Defendant
Rodriguez to ask Plaintiff to exit his vehicle and then allow
Defendants Wilkin and Long to take over as she was already
engaged in another traffic stop; that it was not unreasonable for
Defendant Hustedde, who arrived after Plaintiff was arrested, to

1 question Plaintiff and then call Defendant Salazar; and that it
2 was not unreasonable for Defendant Salazar, who arrived thirty
3 minutes after Plaintiff's arrest, to speak with the officers and
4 then order Plaintiff released. This totally partisan analysis
5 accepts the credibility of the Defendants and ignores the
6 allegations of the Complaint.

7 Plaintiff responds that Defendants' invocation of qualified
8 immunity fails to address the question of national origin
9 discrimination. Although Defendant Rodriguez could lawfully ask
10 Plaintiff to exit his vehicle and turn it over to further
11 investigation, Plaintiff contends, if she did so because
12 Plaintiff was Hispanic, her conduct was unlawful and no officer
13 could reasonably believe "that is a lawful basis." Moreover, she
14 is alleged to have falsely accused Plaintiff of interfering with
15 her unrelated investigation and she did not conduct any sobriety
16 evaluation.

17 "Although a defendant's subjective intent is usually not
18 relevant to the qualified immunity defense, his mental state *is*
19 relevant when ... it is an element of the alleged constitutional
20 violation." *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir.2002),
21 *citing Jeffers v. Gomez*, 267 F.3d 895, 911 (9th Cir.2001).
22 Plaintiff argues that he has not had the opportunity to obtain
23 evidence of motive and should be allowed to do so: "Defendant
24 Rodriguez will need to be able to articulate a lawful basis for
25 her acts and her omissions consistent with the facts and
26 circumstances."

1 Defendants reply that Plaintiff is "attempting to implicate
2 her in a Fourth Amendment violation" and that Defendant
3 Rodriguez's subjective intent is irrelevant:

4 It would not be unreasonable for Rodriguez to
5 ask Plaintiff to exit the vehicle and then
6 allow Officers Wilkin and Long to take over
7 as she was already engaged in another traffic
8 stop. Nor would it be clear to Rodriguez or
9 any other reasonable officer that doing so
10 would be unlawful.

11 The analysis is complicated because the First Claim for
12 Relief alleges both a violation of the Fourth Amendment and a
13 violation of the Equal Protection Clause. Subjective motivation
14 is irrelevant to a violation of the Fourth Amendment but is
15 relevant to a violation of the Equal Protection Clause.
16 Defendants seek qualified immunity solely on the alleged
17 violation of the Fourth Amendment. Here, the Complaint alleges
18 that Defendant Rodriguez falsely accused Plaintiff of interfering
19 with a non-existent traffic stop and with being under the
20 influence of alcohol, when he alleges he was not. It is
21 inferrable that Defendant Rodriguez advised Defendants Long and
22 Wilkin of these allegedly false accusations, thereby causing them
23 to place Plaintiff under arrest. Because the facts have not been
24 developed, there is a dispute as to Defendant Rodriguez's
25 actions. There can be no question that using false accusations
26 to effect an arrest violates a clearly established constitutional
right under the Fourth Amendment of which a reasonable officer
would have known, i.e., the right to be free from arrest when
there is no probable cause. With regard to the alleged violation

1 of equal protection, evidence of subjective motivation is a part
2 of any determination of qualified immunity for the alleged
3 violation of equal protection. This decision cannot be made as a
4 matter of law.

5 Defendants' motion to dismiss on qualified immunity grounds
6 as to Defendant Rodriguez is DENIED.

7 b. Defendant Hustedde.

8 With regard to Defendant Hustedde, Plaintiff contends that
9 he expressly ratified Plaintiff's wrongful arrest by failing to
10 release Plaintiff once Defendant Hustedde acknowledged that
11 Plaintiff had not violated the law:

12 Having reached this conclusion, Defendant
13 Hustedde could not reasonably believe Rascon
14 could lawfully continue to be held ...
Rascon's's continued unlawful detention was
directly attributable to Defendant Hustedde.

15 Defendants cite *Martiszus v. Washington County*, 325
16 F.Supp.2d 1160, 1165 (D.Or.2004) as authority that ratification
17 requires a policymaker's approval of a subordinate's decision.
18 Defendants assert that Plaintiff does not allege that Sergeant
19 Hustedde was a policymaker. *Martiszus* is not controlling.
20 *Martiszus* discusses the imposition of municipal liability under
21 *Monell*.

22 Defendants argue that, "[n]otwithstanding the first question
23 of whether Sgt. Hustedde calling his superior to the scene before
24 he [sic] released Rascon rises to the level of a Fourth Amendment
25 violation, the question is whether it would it [sic] be clear to
26 Sgt. Hustedde that doing so was unlawful under the circumstances

1 facing him."

2 The officers at the scene, Defendants Wilkin and Long,
3 arrested Plaintiff. For reasons based on his own observations,
4 Defendant Hustedde did not agree with their assessment. It is
5 necessary that discovery be conducted to determine the basis for
6 Defendant Hustedde's alleged violation of Plaintiff's rights
7 against unlawful arrest by seeking advice from his superior
8 officer.

9 Defendants' motion to dismiss on qualified immunity grounds
10 as to Defendant Hustedde is DENIED.

11 c. Defendant Salazar.

12 With regard to Defendant Salazar, Plaintiff asserts that
13 circumstances indicate that Defendant Salazar had been briefed
14 before he arrived on the scene because Defendant Hustedde told
15 Plaintiff that a lieutenant had denied Plaintiff's request for a
16 PAZ test. Plaintiff contends that, because Defendant Hustedde
17 had already concluded that Plaintiff had not violated any law,
18 "it is unclear why Salazar had to respond to the scene and why he
19 did not just order him released." Plaintiff asserts that when
20 Defendant Salazar did arrive, he did not immediately order
21 Plaintiff released, although he continued the refusal to conduct
22 a PAZ test requested by Plaintiff.

23 Defendants reply that the fact Defendant Salazar took the
24 time to assess the situation does not implicate him in the
25 alleged Fourth Amendment violation: "He was not there when the
26 events transpired so its stands to reason he would want to gather

1 information before taking action."

2 Although Defendant Salazar was not present when Plaintiff
3 was detained and arrested and did not agree with the assessment
4 by Defendants Rodriguez, Long and Wilkin, it is necessary to
5 conduct discovery to determine why Defendant Salazar did not
6 immediately order Plaintiff's release, knowing that Defendant
7 Hustedde had decided no law had been violated.

8 Defendants' motion to dismiss on qualified immunity grounds
9 as to Defendant Salazar is DENIED.

10 C. SECOND CLAIM FOR RELIEF.

11 Defendants move to dismiss the Second Claim for Relief for
12 conspiracy in violation of Section 1985(3) on the ground that the
13 allegation of conspiracy is not adequately pleaded.

14 In order to state a claim upon which relief can be granted
15 under Section 1985(3), a plaintiff must allege the following four
16 elements:

- 17 (1) a conspiracy; (2) for the purpose of
18 depriving, either directly or indirectly, any
19 person or class of persons of the equal
20 protection of the laws, or of equal
21 privileges and immunities under the laws; and
22 (3) an act in furtherance of this conspiracy;
23 (4) whereby a person is either injured in his
24 person or property or deprived of any right
25 or privilege of a citizen of the United
26 States.

United Bhd. of Carpenters v. Scott, 463 U.S. 825, 828-829 (1983).

23 The second of these four elements requires that in addition to
24 identifying a legally protected right, that the Amended Complaint
25 allege that the conspiracy was motivated by "some racial, or
26

1 perhaps otherwise class-based, invidiously discriminatory animus
2 behind the conspirators' action." *Trerice v. Pedersen*, 769 F.2d
3 1398, 1402 (9th Cir. 1985). "A claim under this section must
4 allege facts to support the allegation that defendants conspired
5 together. A mere allegation of conspiracy without factual
6 specificity is insufficient." *Karim-Panahi v. Los Angeles Police*
7 *Dept.*, 839 F.2d 621, 626 (9th Cir. 1988). In *Holgate v. Baldwin*,
8 425 F.3d 671, 676 (9th Cir.2005), the Ninth Circuit explained:

9 The complaint also failed to allege evidence
10 of a conspiracy and an act in furtherance of
11 that conspiracy, which are required elements
12 of a § 1985(3) action ... It is alleged that
13 Newell and others conspired to violate the
14 Holgate's civil rights, but it did not allege
15 that a specific act was committed in
16 furtherance of this conspiracy ... While Rule
17 8(a)(2) does not require plaintiffs to lay
18 out in detail the facts upon which their
19 claims are based, it does require plaintiffs
20 to provide 'a short and plain statement of
21 the claim' to give the defendants fair notice
22 of what the claim is and the grounds upon
23 which it is based.

24 Defendants argue that the Complaint fails to allege that
25 Defendants agreed among themselves to deprive Plaintiff of equal
26 protection of the laws and fails to allege any facts to support
27 his conclusion that Plaintiff's detention and arrest were
28 motivated by Plaintiff's national origin.

29 Plaintiff responds that he is not alleging that Defendants
30 "started out with a conspiracy." Rather, once Defendants knew of
31 Plaintiff's status as a law enforcement officer, "they began with
32 the unity of purpose to avoid being held accountable for their
33 wrongful acts." Plaintiff asserts:

1 The wrongful act was violating Plaintiff's
2 Constitutional right to be free from
3 unreasonable search and seizure because he is
4 Hispanic. When Defendant Wilkin put
5 Plaintiff under arrest for DUI, without
conducting a field sobriety test or any
evidence to support the arrest, Defendants
Rodriguez and Long became responsible for
failing to act.

6 Normally, that failure to act would go
7 officially unnoticed and unpunished but
8 Plaintiff's position in law enforcement made
9 that less likely. Plaintiff was initially
10 subjected to the bullying that crossed the
11 line into unlawfulness because he is
12 Hispanic; he would not have been treated in
that manner under those circumstances had he
been Caucasian. Once Defendant Officers had
Rascon's badge, they all knew they had gone
too far and that Rascon knew it as well. So
they called their sergeant.

13 Unfortunately, calling the sergeant did not
14 cure the problem. Sgt. Hustedde knew the
15 officers had intentionally violated Rascon's
16 rights and that his detention and arrest was
17 illegal. Defendant Hustedde admitted Rascon
18 had violated no law yet did not release him.
19 Hustedde perpetuated the underlying violation
20 and in so doing, becomes an accomplice after
21 the fact. Like his subordinates, Hustedde
22 called for help because it was obvious the
23 [sic] Rascon's rights had been violated. In
24 other words, like the Defendant Officers,
Hustedde is hoping Lt. Salazar would find a
way out. Despite nearly half an hour of
discussions at the scene, Salazar could not
find a way and ultimately, to his credit,
released Plaintiff. Plaintiff is sure the
defense will have other explanations for the
events, however, at this stage, the facts
must be construed in the light most favorable
to Plaintiff. Plaintiff can construe the
facts, as above indicated, in a manner which
supports his contentions of racial
discrimination, harassment and conspiracy.

25 Accepting as true that Plaintiff's race caused his disparate
26 treatment, detention and arrest, Plaintiff's allegations that the

1 Defendants conspired and combined to falsely arrest and continue
2 to unlawfully detain Plaintiff due to his ethnicity is sufficient
3 for a Section 1985(3) conspiracy.

4 Defendants' motion to dismiss on this ground is DENIED.

5 D. THIRD CLAIM FOR RELIEF.

6 Defendants Rodriguez, Hustedde and Salazar move to dismiss
7 the Third Claim for Relief on the ground that Plaintiff has
8 failed to allege compliance with the California Government Tort
9 Claims Act.

10 As Plaintiff points out, however, the Third Claim for Relief
11 is based on 42 U.S.C. § 1986:

12 Every person who, having knowledge that any
13 of the wrongs conspired to be done, and
14 mentioned in section 1985 of this title, are
15 about to be committed, and having power to
16 prevent or aid in preventing the commission
17 of the same, neglects or refused so to do, is
such wrongful act be committed, shall be
liable to the party injured ... for all
damages caused by such wrongful act, which
such person by reasonable diligence could
have prevented

18 The California Government Tort Claims Act does not apply to
19 actions brought under the federal civil rights acts. See
20 *Williams v. Horvath*, 16 Cal.3d 834 (1976).

21 Defendants' motion to dismiss the Third Claim for Relief on
22 this ground is DENIED.

23 Defendants Rodriguez, Hustedde and Salazar move to dismiss
24 the Third Claim for Relief on the ground that insufficient facts
25 are alleged to support a claim of breach of statutory duty.
26 Defendants assert that Defendant Rodriguez asked Plaintiff to

1 exit his vehicle and than turned the investigation over to
2 Defendants Long and Wilkin because Defendant Rodriguez was
3 involved in another traffic stop; that Defendant Hustedde arrived
4 after Plaintiff's detention and arrest and, after questioning the
5 officers and Plaintiff, summoned Defendant Salazar; Defendant
6 Salazar arrived on the scene at the request of Defendant Hustedde
7 and, after questioning the officers and Plaintiff, released
8 Plaintiff.

9 This ignores that Defendant Rodriguez was the catalyst by
10 falsely reporting to fellow officers that Plaintiff had
11 interfered with her work.

12 Plaintiff responds that the breach of statutory duty is the
13 failure or refusal to prevent the commission of the alleged
14 conspiracy:

15 Defendant Rodriguez was in a position to
16 prevent Defendant Wilkin from arresting
17 Plaintiff when there was no probable cause;
18 Defendant Hustedde was in a position to stop
19 the conspiracy from proceeding by stopping
the continued detention very soon after
Rascon was placed in the patrol car; and,
Defendant Salazar could have stopped it when
Hustedde brief [sic] him.

20 Defendants reply that, because the Complaint fails to
21 adequately allege a claim for conspiracy in violation of Section
22 1985(3), Plaintiff's Section 1986 claim necessarily fails. See
23 *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1040 (9th Cir.1990),
24 *cert. denied*, 502 U.S. 957 (1991).

25 Because Plaintiff has adequately alleged a Section 1985(3)
26 conspiracy against the moving Defendants, the motion to dismiss

1 on this ground is DENIED.

2 CONCLUSION

3 For the reasons stated:

4 1. Defendants' motion to dismiss is DENIED;

5 2. Defendants shall file an Answer to the Complaint within
6 20 days of the filing date of this Memorandum Decision and Order.

7 IT IS SO ORDERED.

8 Dated: January 20, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE